**Before the**
**Federal Communications Bureau**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Connect America Fund | ) | WC Docket No. 10-90 |
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| Universal Service Reform – Mobility Fund | ) | WC Docket No. 10-208 |
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## PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

Pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"), and Section 1.429 of the Commission's rules,[1] the Blooston Rural Carriers hereby petition the Commission for reconsideration and/or clarification of its Mobility Fund Phase II ("MF-II") Order.[2] Specifically, the Petitioners seek reconsideration of (i) the Commission's adoption of a 5 Mbps download threshold for MF-II eligibility; (ii) the Commission's decision not to implement rural and/or small business bidding credits; (iii) various aspects of the Commission's MF-II Letter of Credit ("LoC") requirements; and (iv) the Commission's failure to consider prohibiting MF-II recipients from entering into equipment exclusivity agreements. The Petitioners also seek clarification of the Commission's apparent decision to require collocation for "all" towers in MF-II funded areas, as opposed to "new" towers. These points are discussed in turn below.

## I. The Commission Should Reconsider its 5 Mbps Download Exclusion Criteria

The Commission's decision to use a 5 MBPS download speed threshold to determine eligibility for MF-II funding fails to ensure reasonably comparable service in rural areas, and is arbitrary and capricious. As the Commission clearly recognizes, the Act explicitly "directs [the

[1] 47 USC §405; 47 CFR §1.429.
[2] *In re: Connect America Fund, et al.,* Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, WT Docket No. 10-208, FCC 17-11 (rel. Mar. 7, 2017) (the "Order").

Commission] to fund 'reasonably comparable' services in rural areas to those commonly available in urban areas."[3] Yet, in choosing the 5 MBPS download speed threshold, the Commission looked to the *minimum* speeds generally offered by the nationwide carriers.[4] Removing areas from MF-II eligibility because an unsubsidized carrier is offering *the lowest speed* nationwide carriers generally make available is hardly "reasonably comparable."

On the contrary, the Commission later finds that, "[t]argeting MF-II support to 4G LTE will ensure that we do not relegate rural areas to substandard service that is not comparable to urban LTE service …,"[5] and goes on to require of MF-II recipients that the "median data speed of the network for the supported area must be 10 Mbps download speed or greater and 1 Mbps upload speed or greater…"[6] How can the Commission suggest that it meets its mandate to fund 'reasonably comparable' services in rural areas by requiring MF-II recipients to provide 10/1 service, while at the same time eliminating from eligibility any area that is served by *half that speed*? Petitioners respectfully submit that it cannot.

The logical inconsistency inherent in the Commission's decision is arbitrary and capricious. It is axiomatic of administrative law that an agency decision must be "based upon a consideration of the relevant factors."[7] In the Order, the Commission indicates that it adopted the 5 Mbps download speed standard because, "nationwide carriers … are generally reporting the deployment of 4G LTE reported at minimum advertised download speeds of at least 5 Mbps."[8]

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[3] Order at ¶51.
[4] *Id.*
[5] Order at ¶86
[6] Order at ¶ 87.
[7] *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (U.S. 1971)).
[8] Order at ¶51.

Yet, as noted above, these are *minimum* speeds, not *average* or *median* speeds. It is therefore likely that urban consumers enjoy *faster* service. By considering only the minimum speeds, the Commission has failed to consider relevant factors.

Further, an agency must adequately explain the basis for its decisions.[9] As noted above, the Commission looked to the minimum advertised speeds that the nationwide carriers generally offered – but provided no reasonable explanation as to why this was the appropriate measure. While the Commission notes that it rejected numerous proposals indicating that the 5 Mbps threshold was inappropriate,[10] the only provided rationale was that the MF-II budget is limited. But, *every* budget is necessarily limited. This does not excuse the Commission from the mandates of the Communications Act.

The Commission appears to suggest that advances in the speeds in such areas may be expected,[11] such that these excluded areas may someday receive 10/1 service, but fails to provide any quantitative or qualitative analysis to support this belief. The Commission points to no evidence in the record that suggests these areas are, for example, subject to sufficient competition that would cause the Commission to reasonably expect these speeds to improve, and to do so in a timely manner. On the contrary, the record demonstrates the opposite.[12] And, existing buildout requirements do not require carriers to meet a particular speed threshold.[13]

[9] See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29 (1983).
[10] Order at fn. 220.
[11] *Id.*
[12] See, e.g., Letter from Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p. 2 (Mar. 31, 2017) (stating that the loss of supported service in rural areas means that there will be no competition to prompt unsubsidized carrier networks over time in those areas) ("RWA March 21 Ex Parte"); See also CCA Ex Parte at p. 5.
[13] *See, e.g.*, 47 CFR §27.14.

The Petitioners agree that the Commission should not direct MF-II toward areas that already have access to 4G LTE service that is comparable to service in urban areas. However, the Commission's decision that 5 Mbps download speed is comparable is arbitrary and capricious and should be reconsidered, especially where the Commission itself has found 10/1 to be the appropriate standard for funding recipients.

## II. The Commission Should Reconsider the Decision Not to Allow Bidding Credits

Among the measures suggested by the Blooston Rural Carriers to encourage rural telco participation in MF-II was a proposal to provide bidding credits for small business or rural carriers. The Commission should reconsider its decision not to offer such bidding credits. As an initial matter, it appears that the Order does not address rural carrier bidding credits at all, or at minimum lumps them in with small business credits.[14] Although many rural carriers are also small businesses, the two entity types are not the same, and the Commission has apparently failed to consider the case for a rural bidding credit. As noted above, administrative law requires agencies to consider relevant facts and provide an adequate explanation of their decisions. For rural bidding credits, such consideration and explanation is notably absent.

Substantively, the Commission has an obligation to promote participation in the provision of spectrum-based services.[15] Bidding credits demonstrably assist eligible companies in competing with large regional and nationwide carriers – for example, in the Commission's Auction No. 1002, 38 of 50 winning bidders (more than 75%) sought either rural or small

[14] *See* Order at Section VI. H.
[15] 47 CFR 309(j).

business bidding credits.[16] The fact that some rural or small businesses were able to obtain MF-I funding without the aid of bidding credits is inapposite, as it does not relieve the Commission of the obligation in 309(j). While the Commission appears to put weight on AT&T's argument that it "awarded most of the Phase I support to non-national wireless providers,"[17] a "non-national" carrier is not necessarily a small or rural carrier. Moreover, MF-I funding was fundamentally different from MF-II, with the former being a small, one-time infusion of funds, while the latter is ongoing support for more significant projects. Petitioners urge the Commission to continue its record of success by implementing rural and/or small business credits for MF-II.

## III. The Commission Should Reconsider its Decision to Maintain LOC Requirements

Petitioners applaud the Commission's effort to somewhat broaden the range of options auction participants have in meeting its Letter of Credit (LOC) requirements, by expanding the number of financial institutions that can furnish a LOC. However, Petitioners urge the Commission to go further in relaxing the onerous burden the LOC requirement represents for small carriers, as it goes against the Commission's own goal of maximizing the amount of MF-II funding applied to actual provision of service. At a minimum, the Commission should increase the incremental relief granted as MF-II recipients meet milestones.

In declining to eliminate the LOC requirement, the Commission stated that, "[w]hile we understand that obtaining an LOC incurs costs, we anticipate that bidders can incorporate these costs when determining their bids."[18] The record demonstrates, however, that these costs can be substantial – small carriers are typically required to put "up to 100 percent of the guarantee

[16] *The Incentive Auction "By the Numbers,"* Press Release, dated April 13, 2017.
[17] Order at ¶139.
[18] Order at ¶167.

amount in capital"[19] in order to obtain a letter of credit. Including such costs in bids artificially inflates the bids of small companies, which hinders their ability to be successful bidders, and conflicts with the Commission's repeated statements that it seeks to maximize limited MF-II funding.

Petitioners note that while the Commission maintains strict LOC requirements, it does not appear that it has had to resort to drawing upon a letter of credit in any auction thus far. This suggests that such stringent requirements may not be necessary. Moreover, as pointed out by the Blooston Rural Carriers in this proceeding,[20] rural telephone companies have a decades-long record of successfully using Federal support to implement telecommunications services in difficult-to-serve, low population density areas, without default. Therefore, at a minimum, the Commission should exempt established rural telephone companies from the LOC requirement. If desired, the Commission could limit the exemption to those rural carriers that have not defaulted on Federal support in the past.

As a measure to provide limited relief to all potential applicants, the Commission should revisit the modest reduction track implemented for milestone achievements and replace it with something more aggressive. Currently, an MF-II recipient may obtain a reduction of only 10% of its LoC requirements for meeting more than 60% of its deployment requirements.[21] At 80% deployment, the LoC requirement may be reduced another 10%. The Commission provides no explanation as to why it chose these numbers or how they are appropriate in light of the rapidly

[19] *Ex Parte Presentation of Buffalo-Lake Erie Wireless*, WT Docket No. 10-208, WC Docket No. 10-90, filed February 14, 2017.
[20] *See, Comments of the Blooston Rural Carriers*, WC Docket Nos. 10-90, 14-58, and 07-135; WT Docket No. 10-208; CC Docket No. 01-92, filed August 8, 2014 (2014 Comments of the Blooston Rural Carriers).
[21] Order at ¶172.

increasing LoC requirements. For example, MF-II recipients are required to meet the 60% coverage benchmark within four years. This means that for recipients that are not ahead of schedule, the LoC will need to cover half (four years received funding plus the next (fifth) year's funding) by the time they are eligible for a 10% reduction in LoC requirements. The Commission could easily line up the reductions with the actual benchmarks – 10% off at 40%, 20% off at 60%, and 30% off at 80% - to provide greater flexibility for participants. However, as discussed above, for small carriers with a proven track record of responsibly utilizing Federal support, an exemption (or elimination of the LOC altogether) is the only effective remedy.

## IV. The Commission Should Prohibit Equipment Exclusivity

The Commission should also require recipients of Mobility Fund Phase II support to certify that they do not and will not participate in equipment exclusivity arrangements. As the Blooston Rural Carriers have demonstrated previously in this proceeding, such arrangements harm competition and rural consumers.[22] The Commission's stated objective under the present administration has been to rely upon competition and the marketplace, stepping in to regulate only where competition and the marketplace have failed. Petitioners respectfully submit that this is one such area in which competition and the marketplace have failed. The Commission should take this opportunity to ensure that device exclusivity does not get in the way of true competition.

[22] 2014 Comments of the Blooston Rural Carriers.

## V. The Commission Should Clarify the Collocation Rule

Finally, the Commission should clarify that the MF-II collocation requirement only applies to newly constructed towers in the MF-II funding area. In the Order, the Commission states that it "adopt[s] the same collocation and voice and data roaming obligations for MF-II winning bidders as [the Commission] adopted for MF-I with certain minor, non-substantive changes."[23] The collocation rule in MF-I provided that collocation was required for "all newly constructed towers that the recipient owns or manages in the area for which it receives support."[24] However, the rule actually adopted by the Commission in the Order states that collocation is required for "all towers [the recipient] owns or manages in the area for which it receives support."[25]

Requiring recipients to provide for collocation on all towers, rather than only newly constructed towers is not a "minor, non-substantive change." On the contrary, this change would apply a new public interest obligation to pre-existing towers that were likely built without Federal funding and without the concomitant obligations. At minimum, if the Commission intended for such a change, the Administrative Procedure Act requires that it have been put out for comment.[26] Moreover, many rural carriers may have existing towers that were built years ago to support a simple dispatch antenna to communicate with installation and maintenance personnel, or perhaps a BETRS antenna. These towers often will not be suitable to sustain the much heavier multi-panel antenna arrays deployed for advanced wireless operations.

[23] Order at ¶102.
[24] 47 C.F.R. 54.1006(d), emphasis supplied.
[25] Order at ¶99, emphasis supplied.
[26] 5 U.S.C. § 706(2)(B).

While agencies are free to adopt rules that are not identical to those upon which comment is sought, such differences must be sufficiently minor that they could have been anticipated by interested parties.[27] In the previous FNPRM, the Commission proposed to adopt a rule that was substantively identical to the rule in MF-I, and indeed, purports to do so in the Order. However, the actual rule wording adopted broadens the scope of the MF-I collocation rule considerably. Therefore, the Commission should clarify that the collocation requirement only applies to newly constructed towers.

## VI. Conclusion

For the foregoing reasons, the Commission should clarify and/or modify its MF-II order and rules to implement the changes set forth above, so as to help ensure the success of the program and the ability of rural carriers and their subscribers to benefit from this source of support.

Respectfully submitted,

**THE BLOOSTON RURAL CARRIERS**

By: _____

John A. Prendergast
Salvatore Taillefer, Jr.
Blooston, Mordkofsky, Dickens,
Duffy & Prendergast, LLP
2120 L Street, NW, Suite 300
Washington, DC 20037
Phone: (202) 659-0830
Their Counsel

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[27] *Nat'l Cable Television Assn., Inc. v. FCC*, 747 F. 2d 1503, 1507 (D.C. Cir. 1984).